Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

DALE FURBY,

Petitioner,

v.

UNITED AUTO WORKERS and
CHRYSLER CORPORATION,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF MICHIGAN**

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED FOR REVIEW

1.

IS A STATE LAW HANDICAP DISCRIMINATION CLAIM BY A UNION MEMBER AGAINST HIS UNION PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THAT CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND WHEN THE UNION IS ACTING IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO THE UNION MEMBER?

2.

DOES THE FEDERAL "CONTINUING VIOLATIONS DOCTRINE" PRECLUDE A STATUTE OF LIMITATIONS DEFENSE AS TO A CURRENT EMPLOYEE REMOVED FROM A DESIRABLE POSITION OUTSIDE OF THE LIMITATIONS PERIOD FOR DISCRIMINATORY REASONS WHEN THAT EMPLOYEE CONTINUOUSLY SEEKS AND IS DENIED REINSTATEMENT TO THE DESIRABLE POSITION WITHIN THE LIMITATIONS PERIOD?

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None of the opinions and orders entered in this case have been published. Attached as Appendix D is the May 30, 1997 unpublished decision of the Michigan Court of Appeals. The appendix also contains copies of other unreported decisions and orders relating to this case.

STATEMENT OF JURISDICTIONAL BASIS

Petitioner seeks review of the June 29, 1998 denial of his Application for Leave to Appeal by the Michigan Supreme Court. Appendix B. The Michigan Supreme Court denied petitioner's Motion for Reconsideration on August 28, 1998. Appendix B.

28 U.S.C. § 1257 authorizes this Court to review on a writ of certiorari the order of the Michigan Supreme Court.

STATUTES INVOLVED

29 U.S.C. § 185 (§ 301 of the Labor Management Relations Act)

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization

· (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

· (d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or

subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

Petitioner, Dale Furby, is currently employed by Chrysler Corporation as an unskilled labor. He is a member of the United Auto Workers ("UAW") labor union. His employment with Chrysler Corporation is governed by a collective-bargaining agreement between the UAW and Chrysler.

Furby was admitted as an apprentice to the Chrysler skilled trades program in 1986. He was removed from that program for the ostensible reason of poor performance on June 21, 1991. Furby filed suit in state court alleging that his removal from the skilled trades program was based upon an actual or perceived mental handicap which was unrelated to his ability to perform his job in violation of the Michigan Handicappers Civil Rights Act of ("HCRA"). MCL 37.1101 et seq; MSA 3.550(101) et seq.

Furby was removed from the skilled trades program by a committee comprised of equal numbers of members from the UAW and Chrysler management. In its answer to Furby's complaint the UAW has admitted that it jointly administered the skilled trades program and affirmed Furby's dismissal from that program. Appendix I.

Furby filed his state law HCRA claim on June 17, 1994. The statute of limitations applicable to that claim is three years. Thus there is no question but that Furby's suit against the UAW is timely. However, the timeliness of Furby's suit against Chrysler has been questioned. Chrysler was brought into the suit by way of an amended complaint filed on August 30, 1994 – more than three years after Furby's removal from the skilled trades program.

The UAW filed a motion for summary disposition in the trial court alleging that Furby's HCRA claim was preempted by

§ 301 of the LMRA. Furby contended that his state law rights under HCRA could be enforced without referring to or interpreting the collective bargaining agreement between Chrysler and the UAW. The trial court granted the UAW's motion and dismissed Furby's HCRA claim against the UAW on the basis of federal preemption. In an unpublished opinion the Michigan Court of Appeals affirmed. Appendix D. The Michigan Supreme Court denied Furby's Application for Leave to Appeal.

Chrysler brought a motion for summary disposition in the trial court alleging that Furby's HCRA claim against it should be dismissed because it was filed after the expiration of the three year statute of limitations. Furby contended that the federal "continuing violations doctrine" applied to preclude dismissal based upon the statute of limitations. He argued, that as a current employee of Chrysler, he was subjected to a continuing HCRA violation because of the defendants' refusal to allow him back into the skilled trades program.

Furby's claim against the UAW should not have been held to have been preempted by federal law because it was not necessary to interpret or apply the collective bargaining agreement in resolving his claim. Furby's claim against Chrysler should also not have been dismissed. As a current Chrysler employee seeking a promotion he was a continuing victim of Chrysler's policy of discrimination against persons with his type of actual or perceived mental handicap.

Furby first raised his contention that his HCRA claim against the UAW should not be preempted because that claim could be enforced without interpreting or applying the collective bargaining agreement in his response to the UAW's summary disposition motion. App. H (argument of counsel). Similarly, he raised the applicability of the federal "continuing violations" doctrine, with respect to the Chrysler claim, in his response to Chrysler's motion for summary disposition. App. F (argument of counsel). As can be seen from appendix D and appendix B Furby raised these issues also in the Michigan Court of Appeals

and the Michigan Supreme Court. All of these courts rejected Furby's contentions.

REASONS FOR GRANTING THE WRIT

1. A STATE LAW HANDICAP DISCRIMINATION CLAIM BY A UNION MEMBER AGAINST HIS UNION IS NOT PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT WHEN THAT CLAIM CAN BE RESOLVED WITHOUT INTERPRETING THE COLLECTIVE BARGAINING AGREEMENT AND WHEN THE UNION IS ACTING IN THE CAPACITY OF AN EMPLOYER WITH RESPECT TO THE UNION MEMBER?

The Michigan Supreme Court and the Michigan Court of Appeals have decided an important federal question addressing the preemption of state law claims by § 301 of LMRA in a way that conflicts with the decision in *Smolarek* v *Chrysler Corp*, 879 F2d 1326 (CA 6, 1989 en banc) and the decision in *Lingle* v *Norge Div of Magic Chef, Inc*, 486 US 399; 108 S Ct 1877, 1885; 100 L Ed 2d 410 (1988). Although Furby raised the *Smolarek* argument in the trial court, the Michigan Court of Appeals and the Michigan Supreme Court, those courts simply ignored *Smolarek* and made no reference to it.

The United States Supreme Court has addressed the issue the scope of § 301 preemption in a series of cases. These cases are: *Allis-Chalmers Corp* v *Lueck*, 471 US 202, 211; 105 S Ct 1904, 1911; 85 L Ed 2d 206 (1985); *International Bhd of Elec Workers* v *Hechler*, 481 US 851, 859 n.3; 107 S Ct 2161, 2166-67 n.3; 95 L Ed 2d 791 (1987); *Caterpillar, Inc* v *Williams*, 482 US 386; 107 S Ct 2425; 96 L Ed 2d 318 (1987); and *Lingle* v *Norge Div of Magic Chef, Inc*, 486 US 399; 108 S Ct 1877, 1885; 100 L Ed 2d 410 (1988). The *Lingle* court (p 1885 S Ct) stated the **general rule** as "...In sum, we hold that

an application of state law is pre-empted by section 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement." A plain reading of this general rule indicates that plaintiff's claim against the UAW is not preempted because an interpretation of the collective bargaining agreement is not required. Also, see *Smolarek*, below, where the defendant's intellectual attempts to intertwine plaintiff's claim with an interpretation of the collective bargaining agreement were futile. The cited cases also make clear that collateral and peripheral references to a collective bargaining agreement by a plaintiff in stating a cause of action, also do not cause preemption.

Here the UAW has taken on the capacity of a quasi-employer. It jointly decides with Chrysler whether or not a person should be admitted into the skilled trades apprenticeship program and whether that person should be retained within the program. Thus Mr. Furby's claim is controlled by MCL 37.1205; MSA 3.550(205) which states:

> "Sec. 205.
>
> An employer, **labor organization, or joint labor management committee controlling apprenticeship, on the job, or other training or retraining programs shall not discriminate** against an individual because of a handicap in admission to, or employment or continuation in, a program established to provide apprenticeship or other training."

The preemption issue should be determined by answering the question of whether plaintiff's HCRA claim is

tantamount to a breach of duty of fair representation claim. Only this type of claim is preempted. Plaintiff's claim is not such a claim. Plaintiff has shown that the UAW actually partook in the decision to remove him from the skilled trades program. The question of whether this undertaking arose to the level of the UAW being a quasi employer does not even need to be addressed. The fact that plaintiff's claim is not one involving an alleged breach of the union's duty of fair representation is determinative.

Additionally, it appears that the Michigan Court of Appeals and Michigan Supreme Court overlooked *Smolarek* v *Chrysler Corp*, 879 F2d 1326 (CA 6, 1989). In *Smolarek* the court held that the plaintiff's Michigan HCRA claim against his employer, Chrysler Corporation, was not preempted by federal law. Since the UAW is an employer for purposes of appellant's HCRA claim, the rationale of *Smolarek* indicates that appellant's claim against the UAW, just as his HCRA claim against Chrysler, is not preempted.

The Sixth Circuit Court of Appeals decision in *Smolarek* was an en banc decision. The Michigan Court of Appeals and the Michigan Supreme Court were in error in treating the claims against the UAW as amounting to a claim alleging a breach of a union's federal law duty of fair representation. The UAW directly participated in the decision to remove plaintiff from the skilled trades program. This Court should hold that Furby's HCRA claim against the UAW is not preempted by § 301 of the LMRA.

2. THE FEDERAL "CONTINUING VIOLATIONS DOCTRINE" PRECLUDES A STATUTE OF LIMITATIONS DEFENSE AS TO A CURRENT EMPLOYEE REMOVED FROM A DESIRABLE POSITION OUTSIDE OF THE LIMITATIONS PERIOD FOR DISCRIMINATORY REASONS WHEN THAT EMPLOYEE CONTINUOUSLY SEEKS AND IS DENIED REINSTATEMENT TO

THE DESIRABLE POSITION WITHIN THE LIMITATIONS PERIOD.

There has been a clear violation of the "continuing violations doctrine" in this case. Furby is a current Chrysler employee who is being discriminated against each day that he works because Chrysler refuses to allow him into the skilled trades program for discriminatory reasons.

A review of appendix E (order granting summary disposition to Chrysler) and appendix F (hearing transcript pertaining to that motion) shows that Furby's discrimination claim was dismissed for failure to comply with the statute of limitations. There has never been any fact-finding suggesting that Furby was unable to adequately perform the skilled traded job duties. Any such suggestion merely clouds the continuing violations issue unnecessarily.

a. MICHIGAN APPLIES THE FEDERAL CONTINUING VIOLATION DOCTRINE TO DISCRIMINATION CLAIMS

The Michigan courts rely upon federal precedent when interpreting the continuing violations doctrine. At page 376 of *Sumner* v *Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1987) the Michigan Supreme Court stated: "The doctrine was developed by the federal courts in the context of title VII of the federal Civil Rights Act, and continues to play an important role in federal discrimination law. It is therefore appropriate that we, as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision."

b. THE TRIAL COURT MISCONSTRUED THE CONTINUING VIOLATIONS DOCTRINE

The trial court judge was of the opinion that Chrysler's refusal to allow Furby back into the skilled trades program did not constitute an ongoing tort. The trial court judge stated:

> "The continuing violations theory was developed for the purpose of addressing exactly that, continuing

violations. And the reason the theory was developed was because where there are a series of violations of the same nature, you have to make a decision somewhere whether the statute begins to run from the first act or the last one. Because someone could claim, I suppose, that you know if he's harassed that there's a cause of action that the first time that they're harassed and if they don't bring action within three years, then they're out of court.

Well, this doctrine was developed to accommodate in pursuance of the objects of the act to accommodate those people who are subject to repeated violations of the same kind. And they say no, it's the last act.

That's not what's involved in the case at bar. He was only discharged -- terminated once, and he was never readmitted. He was not discharged the second time. There was nothing to revive. The act complained of occurred in nineteen ninety one. The bare fact that he asked for a reversal of that, for Chrysler to change their minds about that act, doesn't revive the statute of limitations because if that were the rule, he could revive it today by asking to be put back into the program and then bring another action three years from now."

c. A CHALLENGE TO SYSTEMATIC DISCRIMINATION IS ALWAYS TIMELY IF BROUGHT BY A PRESENT EMPLOYEE.

The Supreme Court held at p 535 of *Sumner*:

" Similarly, the court in *Reed* v *Lockheed Aircraft Corp*, 613 F2d 757 (CA 9, 1980), reinstated the plaintiff's cause of action where she claimed that the defendant had engaged in a continuous policy against training and promoting women. Her action had been dismissed, since she had never applied for a promotion, and therefore the plaintiff, in the

district court's view, had not alleged a present violation. However, the company ordinarily approached on its own initiative those employees it wished to promote. In overruling the trial court, the court held that the policy constituted a present violation as required by *Evans*. The court opined that

> **'a challenge to systematic discrimination is always timely if brought by a present employee**, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future.' [613 F2d 761. Quoting Elliott v Sperry Rand Corp, supra at 586.]"

d. THIS CASE IS INDISTINGUISHABLE FROM *ROBSON*

The facts in *Robson* (a companion case to *Sumner*) present circumstances which are legally indistinguishable from those present in Mr. Furby's case. Robson was a test driver for General Motors from 1965 to 1978. He had polio induced scoliosis since childhood. In 1978 a new company doctor recommended that Robson be removed from his driving position. He was removed from that position and placed into another job. Robson continuously attempted to obtain reentry into his position as a test driver. In 1982 Robson was laid off from the security department. Had he remained a test driver he would have had enough seniority to avoid being laid off. Robson filed a handicap discrimination suit on June 14, 1982. This was more than three years beyond his December 7, 1978 removal from the test driver position. The trial court granted summary judgment to General Motors holding that Robson's cause of action accrued on December 7, 1978 when he was removed from the test driver position. Thus the three year statute of limitations period had expired six months before

Robson filed suit. The Court of Appeals affirmed this decision. The Michigan Supreme Court reversed. The Supreme Court held at p 537 of *Sumner*:

> " Plaintiff in this case claims that he was removed from his position on the basis of a discriminatory policy. The fact that he sought to be retransferred on a number of occasions and that company physicians repeatedly found him unfit for test driving is evidence that this policy, its application, and the resultant deprivation continued well into the limitation period. The grant of summary judgment for defendant is therefore reversed."

Similarly, Mr. Furby was removed from the skilled trades program on June 21, 1991. He continuously attempted to obtain readmission into the program without success. This is evidence that Chrysler's discriminatory policy, its application and the resultant deprivation continued well into the limitation period. As in *Robson*, Mr. Furby remained an employee after his removal from the desired position.

e. CHRYSLER'S REFUSAL TO REINSTATE FURBY INTO THE SKILLED TRADES PROGRAM CONSTITUTES A PRESENT A VIOLATION

The Michigan Court of Appeals concluded that the continuing violations doctrine does not apply because plaintiff has not established a discriminatory act within the limitations period. The gist of *Acha, Reed* and *Robson* is that a current employee who was denied a promotion for discriminatory reasons has established a present a violation as a matter of law. This Court should grant petitioner relief because the Michigan decision regarding the "continuing violations doctrine" in this case conflicts with *Acha, Reed* and *Robson*.

CONCLUSION

Petitioner requests that this Honorable Court grant his

Petition for Writ of Certiorari; determine that his HCRA claim against the UAW is not preempted by § 301 of the Labor Management Relations Act; determine that his HCRA claim against Chrysler is not barred by the statute of limitations because of the continuing violations doctrine; remand this matter for trial; and grant any other relief agreeable to equity and good conscience to which Petitioner may be entitled.

Respectfully submitted,

ZALECKI AND BAIR, P. C.

/s/_____
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APPENDIX A

Order
Entered: August 28, 1998

110388 (61)

DALE FURBY,
Plaintiff-Appellant,

v

UNITED AUTO WORKERS and CHRYSLER CORPORATION,
Defendant-Appellee.

Michigan Supreme Court
Lansing, Michigan

Conrad L. Mallet, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

SC: 110388
COA: 190429
LC: 94-418945-CL

On order of the Court, the motion for reconsideration of this Court's order of June 29, 1998, is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 28, 1998 /s/ Jacqueline B. MacKinnon
Deputy Clerk

i0825
SEAL OF THE MICHIGAN SUPREME COURT
LANSING

APPENDIX B

Order
Entered: June 29, 1998

Michigan Supreme Court
Lansing, Michigan

110388

Conrad L. Mallet, Jr.
Chief Justice

DALE FURBY,
Plaintiff-Appellant,

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

v

UNITED AUTO WORKERS and CHRYSLER CORPORATION,
Defendant-Appellee.

SC: 110388
COA: 190429
LC: 94-418945-CL

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 29, 1998 /s/ Jacqueline B. MacKinnon
Deputy Clerk

C0623
SEAL OF THE MICHIGAN SUPREME COURT
LANSING

APPENDIX C

Court Of Appeals, State of Michigan

ORDER

Dale Furby v United Auto Workers

Docket # 190429

L.C. # 94-418945-CL

Michael are Smolenski
Presiding Judge

Michael J. Kelly

Roman S. Gribbs

Judges

The Court orders that plaintiff's motion for rehearing is DENIED.

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Ella Williams, Chief Clerk, on

AUG 06 1997
Date

/s/ Ella Williams
Chief Clerk

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

DALE FURBY,
Plaintiff-Appellant,

v

UNITED AUTO WORKERS and CHRYSLER CORPORATION,
Defendants-Appellees.

UNPUBLISHED
May 30, 1997

No. 190429
Wayne Circuit Court
LC No. 94-418945-CL

Before: Smolenski, P.J., and Michael Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant Chrysler Corporation ("Chrysler") pursuant to MCR 2.116(C)(7) and (C)(10) and an order granting summary disposition to defendant United Auto Workers ("UAW"') pursuant to MCR 2.116(C)(4), (C)(8), and (C)(10). We affirm.

In 1972, plaintiff began working at Chrysler's Sterling Stamping Plant. In 1986, plaintiff entered Chrysler's toolmaking apprenticeship program. In 1987, plaintiff's supervisors commented in monthly evaluations that he had performance difficulties. During a reduction in force in August 1987, plaintiff was laid off from the apprenticeship program and given an

unskilled trade reassignment. Plaintiff was reassigned to the apprenticeship program in March 1991, but again received poor evaluations. In June 1991, Chrysler removed defendant from the program and returned him to his former plant position, citing poor performance as its reason.

Plaintiff appealed this decision pursuant to the grievance procedure set forth in the Chrysler/UAW collective-bargaining agreement. His appeal was denied. In late 1992, plaintiff filed charges with the Michigan Civil Rights Commission ("MCRC") and the Equal Opportunity Employment Commission ("EEOC"), alleging that Chrysler removed him from the apprenticeship program because he is Caucasian. In July 1993, the EEOC determined that plaintiff's removal was based on poor performance.

In February 1994, plaintiff was suspended for failing to be at his assigned job. In April 1994, plaintiff was verbally warned for tardiness. In either May or June 1994, plaintiff was told to work faster, and then chided for working too quickly and endangering others. In August 1994, plaintiff was suspended for allegedly making racial slurs and using abusive language. Plaintiff also contends that Chrysler coerced him to undergo psychological examinations.

On June 17, 1994, plaintiff, acting in pro per, filed a claim against the UAW under the Michigan Handicappers' Civil Rights Act ("MHCRA"), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, alleging that the union failed to represent him when Chrysler accused him of having a handicap. On August 30, 1994, plaintiff filed a two-count amended complaint against Chrysler and the UAW under the MHCRA, alleging (1) that Chrysler and the UAW discriminated against him in administering the apprenticeship program because he had a "general anxiety disorder" and (2) that Chrysler retaliated against plaintiff for filing his administrative complaints. The trial court disposed of plaintiff's claims against Chrysler, concluding that plaintiff failed to timely file his discrimination claim and further failed to provide support for his retaliation claim. The

trial court also disposed of plaintiff's claim against the UAW on the ground that it was preempted by federal labor law.

Plaintiff first argues that the trial court erred in granting Chrysler's motion for summary disposition pursuant to MCR 2.116(C)(7), because he timely filed his discrimination claim. We disagree.

MCR 2.116(C)(7) permits summary disposition of a claim where it is barred by the applicable statute of limitations. *Home Ins Co* v *Detroit Fire Extinguisher Co*, 212 Mich App 522, 527; 538 NW2d 424 (1995). When this Court reviews a motion for summary disposition under MCR 2.116(C)(7), it accepts as true the allegations in the well-pleaded complaint and construes them in the plaintiff's favor. *Kuebler* v *Equitable Life Assurance Soc*, 219 Mich App 1, 5; 555 NW2d 496 (1996). The burden of establishing that a claim is barred by the applicable statute of limitations normally rests with the party asserting the defense. *Id.* This Court reviews the decision to grant summary disposition under MCR 2.116(C)(7) de novo. *Id.*

The applicable statute of limitations mandates that a plaintiff file his cause of action under the MHCRA within three years of the alleged discrimination. MCL 600.5805(8); MSA 27A.5805(8); *Janikowski* v *Bendix Co*, 603 F Supp 1284, 1294 (ED Mich, 1985).[1] Chrysler removed plaintiff from the apprenticeship program on June 21, 1991. Plaintiff filed his discrimination claim against Chrysler on August 20, 1994, approximately two months after the limitations period expired. Therefore, the trial court did not err in granting Chrysler's MCR 2.116(C)(7) motion for summary disposition as to plaintiffs discrimination claim, because it was barred by the applicable statute of limitations. *Home Ins*, *supra*.

Plaintiff offers additional arguments concerning this issue that deserve cursory attention. First, plaintiff contends that his complaint against the UAW, which he filed on June 17, 1994, tolled the statutory limitations period with regard to his handicap discrimination claim against Chrysler. However,

plaintiff failed to name Chrysler as a party in his first complaint. Thus, commencement of plaintiff's action against the UAW did not toll the statute of limitations period as to his claim against Chrysler, because plaintiff had yet to name Chrysler as a defendant and effect proper service against the corporation when he filed suit against the union. See MCL 600.5856(a); MSA 27A.5856(a); *Rodgers* v *Washtenaw Co*, 209 Mich App 73, 75; 530 NW2d 118 (1995).

Second, plaintiff argues, without providing any support, that Chrysler was or should have been put on notice of his claim against it when he filed suit against the UAW. We refuse to search out authority to sustain or reject plaintiff's unsupported argument. See *Magee* v *Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996).

Third, plaintiff advances that his amended complaint against Chrysler and the UAW should relate back to the date on which he filed his original complaint against the UAW. An amendment to a pleading generally relates back to the date of the original filing if the claim or defense asserted in the amended pleading arose out of the same transaction, conduct, or occurrence set forth in the original pleading. MCR 2.118(D); *Hurt* v *Michael 's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). However, the relation back doctrine does not extend to the addition of new parties. *Id*. Therefore, the doctrine does not apply here, because Chrysler was not named as a party in plaintiff's original complaint.

Fourth, plaintiff advances that the trial court should have considered Chrysler's alleged discriminatory acts as part of a "continuing violation" of the MCHRA. Plaintiff acknowledges that his termination from the apprenticeship program took place outside the limitations period, but contends that Chrysler's subsequent refusals to reinstate him to this program, which occurred within the limitations period, amounted to an ongoing pattern of discrimination, thus making his filing timely. We do not agree.

Pursuant to the continuing violations theory of

employment discrimination, a plaintiff may seek damages for violations that occurred outside the statutory limitations period if the violations are "continuing in nature" and at least one of the discriminatory acts fell within the limitations period. *Sumner* v *Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), reh den 428 Mich 1206 (1987). To show a continuing violation, the plaintiff must show (1) a policy of discrimination, (2) a continuing course of conduct, and (3) the present effects of past discrimination. *Bell* v *Chesapeake & Ohio Railway Co*, 929 F2d 220, 223 (CA 6, 1991). Before making this showing, however, a plaintiff must also establish a present violation, i.e. a discriminatory act within the limitations period. *Id.*

Here, plaintiff has not made the preliminary showing of a present violation. Plaintiff claims that he made repeated request for reinstatement to the apprenticeship program that Chrysler repeatedly denied. However, he does not allege that Chrysler denied his requests for reinstatement because of his alleged handicap. Indeed, by the terms of the Chrysler/UAW collective bargaining agreement, plaintiff was not eligible for reinstatement to the apprenticeship program for a neutral reason, i.e. because he was terminated for cause. Because plaintiff has not shown a present violation, he is unable to invoke the continuing violations theory to circumvent the three-year statute of limitations for his handicap discrimination claim against Chrysler. *United Air Lines, Inc* v *Evans*, 431 US 553, 558; 97 S Ct 1885, 1889; 52 L Ed 2d 571, 578-579 (1977); *Sumner*, *supra* at 527.

Next, plaintiff argues that the trial court erred in granting Chrysler's motion for summary disposition pursuant to MCR 2.116(C)(10), because he succeeded in establishing the existence of genuine issues of material fact regarding his retaliation claim against the corporation. We disagree.

MCR 2.116(C)(10) permits summary disposition of a claim where except to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law. In reviewing a trial court's decision regarding an MCR 2.116(C)(10) motion for summary disposition, this Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the nonmovingparty. Stevens v Inland Waters, Inc. 220 Mich App 212, 214; 559 NW2d 61 (1996). We then determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Id.* We review de novo the trial court's grant or denial of a motion for summary disposition. *Id.*

The Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*,[2] prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; MSA 3.548(701); *McLemore* v *Detroit Receiving Hospital*, 196 Mich App 391, 395-396; 493 NW2d 441 (1992). To establish a prima facie case of retaliation under the ELCRA, the plaintiff must establish: (1) that he opposed violations of the ELCRA or participated in activities protected by the act, and (2) that the opposition or participation was a "significant factor" in the adverse employment decision. *Booker* v *Brown & Williamson Tobacco Co*, 879 F2d 1304, 1310 (CA 6, 1989). For the protected activity engaged in by a plaintiff to be considered a "significant factor," the plaintiff must show that it was one of the reasons motivating the adverse treatment. See *Polk* v *Yellow Freight Systems, Inc.* 876 F2d 527, 531 (CA 6, 1989). The mere fact that adverse treatment follows the employee's protected act, however, is insufficient to establish retaliation under the ELCRA. *Booker*, *supra* at 1314.

Here, plaintiff based his claim of retaliation on the mere fact that he received adverse treatment after he lodged complaints of racial discrimination with the EEOC and the MCRC. This is insufficient to establish retaliation under the ELCRA. *Id.* Further, although plaintiff testified at his deposition that Chrysler subjected him to unprecedented disciplinary action

because he was "making waves," plaintiff merely supported this assertion with his own speculation and conjecture, which is insufficient to oppose an MCR 2.116(C)(10) motion for summary disposition. *Libralter Plastics, Inc* v *Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Accordingly, we conclude that the trial court did not err in granting Chrysler's motion for summary disposition as to plaintiffs claim of retaliation under the ELCRA, because plaintiff failed to submit evidence to support his assertion that Chrysler retaliated against him for filing complaints under the act.

Finally, plaintiff argues that the trial court erred in granting the UAW's motion for summary disposition pursuant to MCR 2.116(C)(4) on the ground that federal law preempted his employment discrimination claim against the union, because the union was actually plaintiff's "employer" in the apprenticeship program and, thus, resolution of his claim does not require our interpretation of the collective-bargaining agreement between Chrysler and the UAW. We do not agree.

This Court reviews de novo as a question of law an order granting or denying summary disposition pursuant to MCR 2.116(C)(4). *Steele* v *Department of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996). When reviewing a motion for summary disposition under MCR 2.116(C)(4), we must determine whether the pleadings demonstrate the plaintiff is entitled to a judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact. *Id.*

The authority of Congress to preempt state law is rooted in the Supremacy Clause of the United States Constitution. US Const, Art VI, § 2; *Betty* v *Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Generally, federal law preempts MHCRA claims brought against unions for their failure to adequately represent handicapped employees. See 29 USC 185(A); *Lowe* v *Ford Motor Co*, 186 Mich App 675, 677-678; 465 NW2d 59 (1990). Application of state law in the area of labor relations is preempted where the application requires the

interpretation of a collective bargaining agreement. *Lingle* v Norge Div of Magic Chef, Inc, 486 US 399, 413; 108 S Ct 1877, 1884; 100 L Ed 2d 410, 423 (1988).

Here, plaintiff does not allege that the union failed in its duty of representation on the basis of his alleged handicap. Rather, plaintiff claims that the UAW jointly administered the apprenticeship program with Chrysler, acted as the equivalent of plaintiff's employer, and thus violated the MHCRA by excluding him from the program because of his alleged handicap. Therefore, plaintiff contends, whether the union discriminated against him in violation of the MHCRA involves a mere factual determination applicable to any other employment discrimination action, and not interpretation of the collective bargaining agreement. However, plaintiff has not submitted evidence to support his assertion that the union acted as his employer in the apprenticeship program. Indeed, we can only decide this issue by interpreting the collective-bargaining agreement between Chrysler and the UAW, which we may not do. *Id.* Because plaintiff has failed to establish that federal law does not preempt his handicap discrimination claim against the union, we conclude that the trial court did not err in granting the UAW's motion for summary disposition pursuant to MCR 2.116(C)(4).

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ Roman S. Gribbs

[1] We acknowledge that federal cases are not binding on this Court. However, we do consider them to be persuasive authority with regard to discrimination cases. See *Lytle* v *Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), lv gtd 451 Mich 920; 550 NW2d 535 (1996).

[2] Although plaintiff's complaint asserts that Chrysler retaliated against him for filing complaints concerning alleged handicap discrimination with the EEOC and the MCRC, plaintiff actually filed complaints with these agencies for alleged racial discrimination. Therefore, we address this issue as arising under the ELCRA, and not the MHCRA.

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DALE K. FURBY,
Plaintiff,

v.

Case No. 94-418945-CI
Hon: William J. Giovan

UNITED AUTO WORKERS, and
CHRYSLER CORPORATION,
Defendants.

GREGORY S. MUZINGO (P-29914)
MARGUERITE A SUMA (P-34373)
Office of the General Counsel
Chrysler Corporation
Attorneys for the Defendant
120000 Chrysler Drive
Highland Park, MI 48288 - 1919
(313) 252-8590/956-5804

DONALD N. PERKINS (P 49006)
Attorney for Plaintiff
2 Crocker Blvd.
Suite 301
Mount Clemens, MI 48034
(810) 465-6000

ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY DISPOSITION

at a session of said Court held in the

City County Bldg., in the City of Detroit,
County of Wayne, State of Michigan
on Oct 25, 1995

PRESENT: HON. WILLIAM J. GIOVAN
Wayne County Circuit Court

This matter having come on for hearing on September 15, 1995; the court having received briefs from both parties; having heard the arguments of counsel; and been otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Count I of plaintiff's amended complaint is dismissed for failure to comply with the statute of limitations;

IT IS HEREBY FURTHER ORDERED that Count II of plaintiff's complaint alleging retaliation be dismissed pursuant to 2.116 (C) (10).

Therefore, this case is dismissed in its entirety.

IT IS SO ORDERED.

WILLIAM J. GIOVAN
CIRCUIT COURT JUDGE

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
BY /s/_____
DEPUTY CLERK

Approved As to Form,
Notice of the Entry Waived

/s/ DONALD N. PERKINS (P 49006)
/s/ MARGARET A. SUMA (P 34373)

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DALE FURBY,
Plaintiff,

Case No. 94-418945-CL

CHRYSLER CORPORATION,
Defendant.

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Proceedings taken in the above entitled matter before the Hon. William J. Giovan, Judge of the Circuit Court for the County of Wayne, State of Michigan, on September 15, 1995.

APPEARANCES:
Donald N. Perkins
Attorney at Law
Appearing on behalf of plaintiff

Margaret A. Suma
Attorney at Law
Appearing on behalf of defendant

Martin A Friedman (CSMR 0045)
Official Court Reporter

...

MR. PERKINS: Yes, Your Honor. The defendant has

taken an evolving position in the matter. Their initial position was that, quoting Robson, that the statute of limitations began running from the first instance of discrimination. We pointed out in our answer to that that they had neglected to point out that Robson was overruled on that very point by Sumner. Sumner was actually three cases, one of which was Robson. Sumner was the first case noted in the caption, Robson was the second, and then there was a third.

And Sumner pointed out clearly that the statute of limitations on Michigan handicap act complaints will run from the last or most recent violation, not the first. And the rationale for that set forth a number of policy reasons, quoted the federal government Congressional Report as to why they did that, because it was a remedial statute designed to correct discrimination. The people that were making complaints under it typically were not always aware of the statutes of limitation. Sometimes they went to their union as was the case and the union took a long time to act.

And so to remedy complaints under the handicapper's act from being thrown out on procedural grounds, Sumner set forth a clear policy overruling their -- reversing their case that the statute of limitations would only run from the -- or could start running from the last incident of violation, not the first.

Now, Mr. Furby was kicked out of or terminated from the program in nineteen ninety one. He appealed his termination on February fifth -- or his appeal was rejected by Chrysler on February fifth, nineteen ninety two. And Robson said that well the appeal doesn't count, but Robson was reversed and even if you take when his appeal was finally denied it fits within the three year statute of limitations.

THE COURT: How about the appeal? Does that qualify?

MS. SUMA: No, it doesn't and I'll tell you the reason it doesn't, Your Honor, is because -- and counsel appropriately points out that Robson was, in fact, altered by Sumner. But if we look to Sumner to determine when the continuing violation

theory is applicable, it's exactly -- it's interesting because the note here exactly what we're talking about. It says defendant is correct in pointing out that mere requests far consideration do not revive an untimely cause of action. And that's all you have here, is a request for reconsideration.

This is not the sort of fact where someone's in the plant and is claiming he's being harassed and the harassment continues and six months later there's another comment made and six months after that there's another comment made, so that it's a continuing policy.

You have a single discrete act by the corporation of removing him. It is not repetitive conduct, such as the harassment type theory. And I say that Sumner specifically directs this sort of factual instance.

MR. PERKINS: Well, that is factually incorrect, Your Honor. The discrimination against Mr. Furby has not been confined to a single discrete act. It has extended beyond Mr. Furby's -- not only his appeal of that, but also his presentation in nineteen ninety three when he was first diagnosed as having a protected handicap. And that was presented to Chrysler Corporation and they still refused to admit him into the program.

And, in fact, last month Mr. Furby attempted to re-enter the apprenticeship program. He actually attended the classes, took the test, and when he got his test results back after that he was informed by Chrysler that since he had been ejected from the -- terminated from the program the first time, that he wasn't going to be allowed to go back in. So, there have been specific instances of discrimination and specific denial of his attempts to get into the apprenticeship program as late as last month.

And certainly from the time he presented to them the doctor's diagnosis that he suffered from a protected handicap, that was in nineteen ninety three, and he filed his complaint and included Chrysler clearly three years from nineteen ninety three when that was presented to Chrysler.

THE COURT: The continuing violations theory was

developed for the purpose of addressing exactly that, continuing violations. And the reason the theory was developed was because where there are a series of violations of the same nature, you have to make a decision somewhere whether the statute begins to run from the first act or the last one. Because someone could claim, I suppose, that you know if he's harassed that there's a cause of action that the first time that they're harassed and if they don't bring action within three years, then they're out of court.

Well, this doctrine was developed to accommodate in pursuance of the objects of the act to accommodate those people who are subject to repeated violations of the same kind. And they say no, it's the last act.

That's not what's involved in the case at bar. He was only discharged -- terminated once, and he was never readmitted. He was not discharged the second time. There was nothing to revive. The act complained of occurred in nineteen ninety one. The bare fact that he asked for a reversal of that, for Chrysler to change their minds about that act, doesn't revive the statute of limitations because if that were the rule, he could revive it today by asking to be put back into the program and then bring another action three years from now.

This is dispositive, I believe, and the motion is granted.

...

APPENDIX G

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

DALE FURBY,
Plaintiff

v.

UNITED AUTO WORKERS, AND CHRYSLER CORPORATION,
Defendants.

94-418945-CL 6/17/94
JDG: WILLIAM J. GIOVAN
FURBY DALE K.
VS
UAW INTERNATIONAL UNION

ORDER OF SUMMARY DISPOSITION

At a session of said Court
in Detroit, Wayne County, Michigan
on February 17, 1995
present: Hon. William J. Giovan

This matter having come before the court on motion by Defendant International Union, UAW, argument having been hand in open court and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that all claims against Defendant International Union, UAW are dismissed with prejudice for the reasons indicated on the record.

WILLIAM J. GIOVAN
Circuit Court Judge

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
BY /s/_____
DEPUTY CLERK

APPENDIX H

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DALE FURBY,

Plaintiff,

-vs- Case No. 94-418-945-CZ

UNITED AUTO WORKERS, AND CHRYSLER CORPORATION,
Defendants.

DEFENDANT UAW'S MOTION FOR SUMMARY DISPOSITION

Proceedings had in the above-entitled matter before the HONORABLE WILLIAM GIOVAN, Wayne County Circuit Court Judge at the City-County Building, Courtroom 1511, Detroit, Michigan, 48226 on Friday, February 17, 1995.

APPEARANCES:

MILLER & SHENSKY, P.C.
1400 Woodward - Suite 203
Bloomfield Hills, Michigan 48303
(By RICHARD A. MEIER, ESQ., P38204)

Appearing on behalf of Plaintiff Dale Furby

U A W INTERNATIONAL UNION
8000 Jefferson Avenue
Detroit, Michigan 48214-2699

(By CONNYE Y. HARPER, ESQ., P26448)

Appearing on behalf of the Defendant United Auto Workers

REPORTED BY: MS. IRENE J. MARTIN, CSHR 4879
(313-963-6448)

...

MR. MEIER: Your Honor, what we are alleging, and what we have done in our brief is state that this cause of action, the Michigan Handicapper is what the call an independent state right.

The Courts in Allis-Chalmers and Smolerek from the Sixth Circuit have all indicated that the Proper analysis for any kind of claim to determine whether preemption occurs under Section 301 is to look at the complaint.

I filed with the Court a copy of the complaint. If, in fact, the complaint alleges an independent state right, no preemption is required by this Court.

If, in fact, the complaint alleges some kind of interpretation of the collective bargaining agreement, then in that particular case, then preemption is required.

In this case what we are alleging and what we have indicated in our Complaint -- and there is nothing in the Complaint that indicates anything about a collective bargaining agreement.

What we are alleging is that UAW as a joint administrator of a program, which they have admitted in their answer, terminated the plaintiff.

And he is alleging, just like as if the UAW were an employer, he is alleging a violation under the Michigan Handicapper Act.

What he is alleging is that he has a handicap which is nerve disease. He has indicated that.

I have provided documents to this Court that on two separate evaluations, that nerve disease was mentioned by the person doing the evaluation. The Plaintiff was ultimately

terminated from the program.

His only claim in his complaint against the UAW is a Michigan Handicapper claim. There is nothing in the claim alleges any kind of violation of the collective bargaining agreement.

Now, obviously the Defendant wants to raise it as a defense which is her right. However, that would not go toward any kind of preemption of this claim.

Therefore what we are alleging is basically if, in fact, he is limiting his case to the Michigan Handicapper's Act, he has an independent cause of action in this particular case. And therefore preemption is not necessary.

THE COURT: He says the UAW took the position of an employer; occupied the position of an employer in this.

...

APPENDIX I

[Excerpts from Plaintiff's Amended Complaint]

...

7. Said program was jointly administered by the UAW.

10. On June 21, 1991 plaintiff was removed from the apprenticeship program by Chrysler Corporation. The UAW affirmed the dismissal.

...

[Excerpt's from UAW's Answer to Complaint]

...

7. Defendant admits the allegations of paragraph seven.

10. Defendant admits the allegations of paragraph ten and affirmatively states that plaintiff was removed due to his poor job performance.

...